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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

**On Writ of Certiorari to the Supreme Court of Indiana**

## MOTION OF THE AIR TRANSPORT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

## BRIEF OF THE AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE

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October 9, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## MOTION OF THE AIR TRANSPORT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Air Transport Association of America ("the Association") pursuant to Rule 42[1] moves this Honorable Court to grant it leave to file a brief, as *amicus curiae,* in support of Petitioners in the above entitled matter.

### INTEREST OF THE AIR TRANSPORT ASSOCIATION

The Air Transport Association is an unincorporated trade association made up of 43 air carrier members all authorized and required to provide air transportation pursuant to certificates of public convenience and

[1] Revised Rules of the Supreme Court of the United States, Adopted April 12, 1954, Effective July 1, 1954.

necessity issued by the Civil Aeronautics Board in accordance with section 401 of the Federal Aviation Act. 76 Stat. 143, 49 U.S.C. sec. 1371. One or more of our carrier members provides scheduled air transportation in every state of the union. Nine of them provide transportation of persons, property and mail into and out of cities within the State of Indiana. Official Airline Guide, City Index (September 1964).

The Articles of Association under which we operate have been approved by the Civil Aeronautics Board as consistent with the public interest. CAB, *Order No. E-14996* (March 10, 1960). Among the objects and purposes of the Association is promotion of aviation safety and, to that end, participation in proceedings before governmental agencies and courts.

One of the Association's principal activities in behalf of its carrier members is working with those local, state and Federal agencies responsible for developing a system of airports capable of meeting the growing needs of the nation. In this endeavor our chief emphasis is upon the development of airports that can be used safely and efficiently by our carrier members and the traveling public and which permit persons living or working in the vicinity of airports to do so in safety and with peace of mind.

## REASONS FOR FILING A BRIEF AS AMICUS CURIAE

Zoning for the purpose of preventing hazardous obstructions from being erected in airport approach zones and prohibiting land use for purposes incompatible with safe aerial navigation is essential if the above stated objectives are to be realized. It requires full cooperation between the states, in whom the police power resides, and the Federal Government upon whom ultimate responsibility for encouragement and development of a safe air transport system devolves.

By nullifying *in toto* a zoning regulation of Gary, Indiana, clearly authorized by an enabling statute of that state and based on a model devised by the Federal Aviation Agency, the decision of the Supreme Court of Indiana being reviewed, has virtually removed Indiana from this partnership. Furthermore, it has cast significant doubt upon the future of zoning in Indiana. If this decision as written acquires the imprimatur of this Court efforts to zone around airports in other states may also be paralyzed. Such a disposition of the question by this Court, therefore, could have a serious and far-reaching impact upon the development and utility of airports across the nation. In some cases it might even result in impairing the service our carrier members are required to provide under the Federal Aviation Act.

Notwithstanding such a possibility, the question before this Court could be argued narrowly by Petitioners and Respondent, whose primary emphasis will be on their individual plights. Their dispute sounds in tort for monetary damages and their chief interests, understandably, are in the ultimate outcome of that dispute. The parties doubtlessly will address themselves to the constitutionality of zoning around airports. But there is no reason for believing that their interest or involvement in airport zoning the nation over will be as sustained as ours, which will survive this litigation regardless of its outcome.

We take no position in the narrow dispute between Petitioners and Respondent. We do assert that the decision of the Indiana Court was erroneous as a matter of law and that it portends much mischief. If permitted to file a brief as *amicus curiae,* we shall, of course, discuss the judicial decisions which, we submit, preclude a priori annihilation of zoning regulations. But we shall stress also the experience of aeronautical

users of airspace in terminal areas (approach zones) to emphasize how airport zoning bears a "substantial relation to the public health, safety, morals or general welfare." See *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 97 (1926). It is respectfully submitted that our background and experience equips us better to supply this emphasis, and thus to aid this Court, than does that of the parties to the litigation.

## CONCLUSION

In view of the nation-wide interest of the Association and its carrier members in the development of safe and efficient airports, appropriately zoned, and the first-hand experience of its members in using navigable airspace, including airport approaches, it is submitted that we can be of assistance in the exploration and resolution of the question here presented. The Air Transport Association, therefore, earnestly hopes that this Honorable Court will afford it the opportunity to be of service in this matter which is so vital to the nation's air transport system by granting it leave to file a brief as *amicus curiae*.

Respectfully submitted,

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## BRIEF OF THE AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE

### I. INTEREST OF THE AMICUS CURIAE

The Air Transport Association of America is an unincorporated trade association made up of 43 air carrier members all authorized and required to provide air transportation pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board in accordance with section 401 of the Federal Aviation Act. 76 Stat. 143, 49 U.S.C. sec. 1371. One or more of our carrier members provides scheduled air transportation in every state of the union. Nine of them provide transportation of persons, property and mail into and out of cities within the State of Indiana. Official Airline Guide, City Index (September 1964).

The Articles of Association under which we operate have been approved by the Civil Aeronautics Board ("CAB") as consistent with the public interest. CAB, *Order No. E-14996* (March 10, 1960). Among the objects and purposes of the Association is promotion of aviation safety and, to that end, participation in proceedings before governmental agencies and courts. Except for a single helicopter operator, none of our carrier members currently provide air transportation through the Gary, Indiana Airport. However, since zoning in the vicinity of airports to promote safety is of deep concern to all of our carriers and since the instant case brings the question of airport zoning before this Court for the first time and its outcome may well affect airports served by our members elsewhere in Indiana, and possibly in other states, it is of immediate interest to us.

As *amicus curiae,* we are asking this Court to reverse, limit or clarify, as it sees fit, a decision of the Supreme Court of the State of Indiana holding that an ordinance of Gary, adopted in accordance with an appropriate enabling statute of the Indiana Legislature,[1] is void *in its entirety* because it amounts to a "taking" of Respondent's property which is forbidden by the Federal Constitution and the Constitution of the State of Indiana. In the final analysis that decision seeks justification for its sweeping proscrip-

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[1] Although in another connection the Indiana Court refers to *Yara Engineering Corp.* v. *City of Newark,* 132 N.J.L. 370, 40 A2d 559-61 (1945) where it was noted that there was nothing in New Jersey's "enabling statute which authorized the enactment of an ordinance for the zoning of land solely for the use of an airport", it was nowhere held that the Gary Ordinance was not sanctioned by the Indiana Enabling Statute. See 5 Burns Ind. Stat. 14-422.

tion in decisions of this Court, including *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). We think it completely misconceives the message and spirit of both of these cases and reveals some confusion regarding the limitations on police power recognized by this Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). If the decision stands as written and is read as invalidating the Gary Ordinance in its entirety it could nullify future efforts to zone in the vicinity of airports all over Indiania and possibly jeopardize the state's Tall Structures Act.[2]

Moreover, especially if the decision becomes contagious across state lines, or appears to be blessed by this Court, it could do much mischief to the vital national objective of developing an ever improving air transport system—and it could frustrate the wish of Congress, expressed this year, in an amendment to the Federal Airport Act, to impress upon local communities and states that it is essential for them to make every reasonable effort to implement appropriate zoning in furtherance of safety and local tranquility.[3]

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[2] The Tall Structures Act regulates the location and height of structures and the use of land related thereto in localities within the state not covered by zoning regulations. 5 Burns Ind. Stat. 14.327–14.341, 1963 Cum. Supp.

[3] In March of this year Congress added to the Federal Airport Act a requirement that the Administrator of the Federal Aviation Agency, as a condition precedent to approving a project as eligible for Federal assistance under the Act, obtain a written assurance from the recipient community that, to the extent reasonable, zoning laws restricting land use in the vicinity of the airport will be adopted. Pub. L. 88-280, 88th Cong., 2d Sess. sec. 10 (March 11, 1964). This amendment, which is explored in some detail at pp. 21-24, *infra*, confirmed the Administrator's long standing practice of insisting upon such a commitment from Airport

Encouragement and development of a nation-wide air transport system is embodied in two Congressional acts, the Federal Aviation Act and the Federal Airport Act.[4] Encouragement and development of such a system calls for Federal and state partnership. The Federal commitment is immense and the Federal undertaking has been aided and supplemented at the local level by use of the police power, historically said to reside in the several states. In addition to the bedevilments noted, the decision below, if it is upheld without qualification, could remove Indiana from this partnership.

We are interested only in having this Court make certain that the action taken below (invalidation of the Gary Ordinance in its entirety) is not read as indicating that a state's police power cannot be used to zone in the vicinity of airports. We take no position as to whether that ordinance may be considered a "taking" or otherwise void, as to the Respondent's identifiable real estate if, indeed, it is applicable at all against the Toll Road Commission.[5]

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sponsors. To aid sponsors in formulating zoning regulations the Administrator in conjunction with the National Institute of Municipal Law Officers ("NIMLO") adopted a model ordinance (effective in February, 1946) based on Technical Standard Order N-18, the technical document used by the Administrator to determine obstructions around airports.

[4] Federal Aviation Act, 72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. sec. 1301.

Federal Airport Act, 60 Stat. 170, 78 Stat. 158, 49 U.S.C. sec. 1101.

[5] We do not know whether or not the Indiana Toll Road Commission is possessed of such governmental character as to put it beyond the Ordinance. The trial court in Indiana is said to have rejected the supervening act contention. Petition For Certiorari, p. 8. (Cf. R. 12 and R. 13.) The Annotation on the subject in 61 A.L.R. 2d 970-78 raises a question.

## II. ARGUMENT

### A. The Indiana Court's Decision Was Wrong as a Matter of Law and is in No Sense Required or Sanctioned By Prior Decisions of This Court.

As we have already noted, this decision, if upheld, will represent a setback in the use of a state's police power to zone around airports even when it is done to fulfill a compact with the Federal Government found by Congress and the Legislature of that state to be for the public good. Traditionally police power has been exercised to require or forbid certain actions by individuals or groups of individuals when the overall good of the community, and with it the good of the individuals affected, would be served. To be valid, such enactments must be reasonably related to the public health, general welfare, safety or morals of the community.[6] Not all exercises of police power have been upheld. But it has been used validly for many purposes, even to put conditions on freedom of speech and assembly.[7]

Statutes and regulations also have placed restrictions on the use of property as well as on personal freedom. Zoning ordinances come under this heading. Subject, of course, to the aforesaid threshold requirement, to factual determinations in individual cases (*e.g.*, consideration of the general character of the area and neighborhood affected) and to a weighing of public gain against individual hardship, zoning has emerged as a means of keeping liquor stores away

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[6] *Lawton* v. *Steele*, 152 U.S. 133 (1894); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); 11 Am. Jur., Const. Law, secs. 267-77.

[7] *Schenck* v. *U.S.*, 249 U.S. 47 (1919); 58 Am. Jur., Zoning, sec. 22; 8 A.L.R. 2d 1964.

from churches and schools,[8] preventing industrial plants from destroying residential communities[9] and restricting the heights of buildings and other structures that blot out sunlight and congest city sidewalks.[10] Zoning has been used too for purposes other than heading off portentous evils. In some instances economic and aesthetic benefits have been bestowed upon communities by adoption of appropriate zoning regulations.[11]

Zoning laws are of relatively modern origin as this Court noted in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In 1926 this Court was able to catalogue a number of regulations which it said probably would

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[8] Rhyne, *Municipal Law*, secs. 32-52 (1957); 96 A.L.R. 778 (1935).

[9] *Id.*, secs. 32-56.

[10] *Euclid* v. *Ambler*, *supra*.

[11] *Lewis* v. *District of Columbia*, 89 U.S. App. D.C. 72, 190 F. 2d 25 (D.C. Cir., 1951); 8 McQuillin, *Municipal Corporations*, secs. 25.29–25.31 (3rd ed., Rev.). This Court has recognized aesthetics as among those values to be preserved in the interest of general welfare. In *Berman* v. *Parker*, 348 U.S. 26 (1954), the exercise of the power of eminent domain by a District of Columbia land agency was upheld where the objectives of the land agency were to keep the community beautiful. This Court said:

> "The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. Missouri, 342 US 421, 424, 96 L ed 469, 472, 72 S Ct 405. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

For an informative discussion of some of the indirect benefits to the general public that can be achieved through zoning, see Bettman, *Constitutionality Of Zoning*, 37 Harv. L. Rev. 834 (1924).

have been rejected as arbitrary and oppressive a century before but which, in the light of conditions existing at the time of that decision, seemed both wise and necessary and were uniformly sustained. *Id.* at 386, 87.

Even when its relatively modern origin is considered, much zoning took place before airports were heard of or during the days of their primitive development. So, in the beginning, zoning was not associated with airports and airports were not associated with zoning. But as aviation began to develop and airports began growing across the nation, it was quite natural for local authorities, encouraged by the Federal Government, to consider zoning in the vicinity of airports.[12] Height zoning around airports is but an extension of height zoning elsewhere. It is not a type of zoning different in kind from all others. In effect, it does no more than limit heights in "airport districts" for the benefit of the community as a whole, including individual property holders who give up some rights to benefit the community, of which they are a part.[13] Height limitations and land use restrictions have long been recognized in "business districts", "residential districts" and "industrial districts" and have made the same demands upon property situated therein as height limitations make upon property situated around airports.

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[12] Alameda County, California was the first to do so in 1928. The need for such zoning was recognized by the Federal Government (Civil Aeronautics Administration and predecessor) in 1930 and again in 1938. Rhyne, *Municipal Law*, sec. 22-22 (1957).

[13] Rhyne, *The Legal Experience of Airports*, 11 Journal of Air Law and Commerce 297, 314 (1940); 8 McQuillin, *Municipal Corporations* (3rd ed. Rev.) secs. 25.110–25.118.

Of course, limitations on the uses to which property may be put in any of these areas are expressed in terms relevant to the activities expected to be conducted within the respective areas. Since airport activities consist of aircraft landings and take-offs, it follows that height limitations and restrictions on communication propagations that would distort radio navigation, are important examples of the kinds of uses to which property situated near airports should not be put if public safety is to be considered. On their face ordinances imposing such limitations, restricting the use which an individual may make of his property in the proximity of an airport, are reasonably related to the safety and welfare of the community. The denial to an individual of *absolute* freedom to use his property as he sees fit, therefore, does not seem too harsh. Cf. *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). And, if any distinction is to be made among the grounds on which the exercise of police power is justified, surely an ordinance based upon considerations of safety (the preservation of life as well as property) must be accorded the highest standing.

In *Euclid* v. *Ambler, supra,* this Court was asked to strike down *in its entirety* a comprehensive zoning ordinance adopted by the Village of Euclid, Ohio. That ordinance, among other things, limited the height of buildings within specified zones and excluded apartment houses, business houses, retail stores, shops and other like establishments from residential districts.[14] In its disposition of the case, this Court observed that decisions in the states were numerous and conflicting, some holding that such restrictions bear a rational relationship to the health and safety of the community,

[14] See 3 Metzenbaum, *Law of Zoning* (2d ed.), p. 1939.

some holding that they do not. Citing with approval *Aurora* v. *Burns,* 319 Ill. 84, 93, 95, 149 N.E. 784, and *State ex rel. Civello* v. *New Orleans,* 154 La. 282, 83, 97 So. 440, both in the first group, this Court noted such things as economy in the matter of paving streets, expediting local transportation, heading off interference with the circulation of air and sun rays and avoiding disturbing noises from automobiles as objectives that could not be put outside the valid exercise of police power. Speaking through Mr. Justice Sutherland, this Court said:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, *as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.* Thomas Cusack Co. v. Chicago, 242 U.S., pp. 530, 531, 61 L. ed. 475, 476, L.R.A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594; Jacobson v. Massachusetts, 197 U.S. 11, 30, 31, 49 L. ed. 643, 651, 652, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.
>
> "It is true that *when,* if ever, the *provisions* set forth in the ordinance in tedious and minute detail, *come to be concretely applied to particular premises including those of the appellee,* or to particular conditions; or to be considered in connection with specific complaints, *some of them,* or even many of them, *may be found to be clearly arbitrary and unreasonable.*
>
> * * * * *
>
> "In the realm of constitutional law, especially, this Court has perceived the embarrassment

> which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application to extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. *This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police,* with which we are here concerned." 272 U.S. at 397. (Emphasis supplied.)

Contrary to these clear instructions, the Indiana Court nowhere spelled out wherein it felt the Gary Ordinance failed to bear a rational relationship to the general welfare, health, safety and morals of the people of Gary. As a strict matter it did not even sound the incantation. Instead, and despite its own reference to *Euclid,* which points exactly the other way, it nullified the entire ordinance.[15]

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[15] No treatment was given to the severability clause of the ordinance. Section 12 of the Gary Ordinance says:

> "If any of the provisions of the ordinance or the application thereof to any person or circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable." R. 157.

It is fundamental that a statute may be constitutional in one part and unconstitutional in another part, especially when a severability clause is included in it, subject only to the natural corollary that it may sometimes be impossible to separate the parts. Cases supporting this principle are almost too numerous to cite. They are collected in 11 Am. Jur., Const. Law, sec. 152. *Watson* v. *Buck,* 313 U.S. 406 (1941) holds that a Federal Court cannot invalidate a state statute containing a severability clause.

The Indiana Court cites *Euclid* v. *Ambler, supra,* in conjunction with *Mugler* v. *State of Kansas,* 123 U.S. 623, 661 (1887), presumably to support Respondent's right to question the constitutionality of the ordinance without first seeking a variance, and to justify its own action in going beyond the stated purpose of the ordinance to look at its substance. We are not questioning the court's consideration of the constitutional argument or its refusal to be "bound by mere form." We are concerned, however, with the outcome—with the apparent inclination to apply different standards in deciding the validity of zoning regulations in the vicinity of airports than this court has applied in other zoning cases; *e.g.,* in *Euclid.* The Gary Ordinance was not said to be unrelated to general welfare and safety. It was not held to be a "taking" as applied to Respondent's property (for which compensation should be paid or, perhaps, against which the applicable section is inoperative) but otherwise a valid exercise of police power. It was simply eliminated.

The decision is unclear as to the rationale and authority on which the case was decided. The court seems to say that the ordinance per se did the "taking", as the statute in *Pennsylvania Coal Co.* v. *Mahon, supra,* was said to do. On the other hand, in the opinion there is much discussion of *Causby* and *Griggs* both of which held that a "taking" occurred as a result of frequent flights of aircraft over specific real estate at very low altitudes. And, in rejecting Petitioners' argument that the Toll Road Commission should have protected itself by inverse condemnation proceedings under the Eminent Domain Statute,[16] the

[16] 2 Burns, Indiana Statutes Annotated, secs. 3-1706–3-1711.

court said that the "taking" must be an accomplished fact to permit such an action and that it could not be an accomplished fact since "actual encroachment" was impossible because the power lines adjacent to the toll road "are much higher than the toll road." R. 216, 17.

In *Pennsylvania Coal Co.* v. *Mahon, supra*, this Court held that a statute of that state, admittedly destroying contract rights, and denying a mining company all rights to mine the coal that it had reserved by contract, for the benefit of "a single private house" located on the surface, was such a diminution of previously existing rights that it had reached the magnitude where "there must be an exercise of eminent domain and compensation to sustain the act." This decision, rendered four years before the decision in *Euclid*, itself stresses that the question of "taking" turns upon particular facts. Actually it helped pave the way for *Euclid* by noting that some values are enjoyed under an implied limitation. Mr. Justice Holmes wrote:

> "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, *some values are enjoyed under an implied limitation, and must yield to the police power.* But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.*" 260 U.S. at 413. (Emphasis supplied.)

If the *Euclid* decision had not instructed that zoning regulations "be concretely applied to particular premises" the *Pennsylvania Coal* case, upon which the Indiana Court relies, seems to have suggested it. And, of course, *Euclid* did chart the course that this Court wanted followed in zoning cases.

Rather than follow that course by limiting its invalidation of the Gary Ordinance to those provisions which, when "concretely applied" to Respondent's property, seem "arbitrary and unreasonable", the court below sought to distinguish between what it called "regulation under the police power which can be modified at the discretion of the regulating authority" and "'taking or appropriating of private property by the government for a specific public use." R. 214. There is no elucidation of the court's conclusion that the Gary Ordinance falls in the latter category. The court does not say why the availability of a waiver does not operate to permit modifications if circumstances so dictate, at least insofar as specific property owners are concerned.[17] It merely states that "the taking or appropriating of private property by the government for a specific public use" can be effected only if compensation is provided. *Pennsylvania Coal* and *Griggs* are cited as authority for the conclusion. There is nothing in *Pennsylvania Coal* to support the thesis that the City of Gary would have to condemn and pay for all land extending six miles out

[17] This aspect of the ordinance was treated summarily in the decision below. The court's anxiousness to reach the constitutional issue may well have denied an administrative remedy to Respondent. If, as the court observed, the adjacent power lines shielded the toll road, a waiver almost surely would have been granted.

before it could adopt the ordinance.[18] And, as indicated above, *Griggs* held only that "regular and almost continuous daily flights", passing within 30 feet of the landowner's residence on take-off and within 53

[18] The opinion cites *United States* v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y., 1956), and *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex., 1956) as evincing recognition by the Federal government that easements for the glide angle needed for landing and takeoff must be acquired by condemnation proceedings and payment of just compensation. To be sure there are times when the government regards it essential to acquire air easements and no one can doubt that a condemnation proceeding and just compensation are necessary to acquire those easements. But it can not follow, without doing violence to the rationale of *Causby*, that easements must be acquired to permit all landings and takeoffs. In *All American Airways* v. *Village of Cedarhurst*, 106 F. Supp. 521 (U.S.D.C., E.D., N.Y., 1952), *aff'd.* 201 F. 2d 273 (2d Cir., 1953) it was contended that authorization in the Federal Aviation Act for the Administrator to acquire "easements through or other interests in immediately adjacent" airspace meant just that. Judge Rayfiel rejected the contention saying:

> "I do not believe that Congress intended that the 'Administrator' should be required to condemn or otherwise acquire the airspace adjacent to every plot of land over which planes under its supervision and control would be obliged to fly in landing at or leaving an airport. Even if that were the intent of Congress the remedy of an affected property owner is by an action for damages in the Court of Claims, as was done in the Causby case, supra." 106 F. Supp. at 523.

If it were otherwise airports would become the size of the most extended glide slope needed for each runway and, in some cases, would reach upward well in excess of a thousand feet. In the case of those airports having Instrument Landing Systems ("ILS") this would mean condemning approximately four or five miles for each ILS runway. For example, an outer marker five miles out with a 2½° glide slope will describe a triangle whose height is 1330 feet. Annex 10 to the Convention on International Civil Aviation 11, 12 (November 1, 1963) and United States Manual, Criteria For Standard Instrument Approach Procedures, 25, 27 (September 1, 1956). This is not the direction of *Causby* and *Griggs*.

feet of it when landing, made the property unusable as a residence and so amounted to a "taking" for which the Greater Pittsburgh Airport had to pay. Following the landmark decision in *Causby*, the *Griggs* case recognized ownership of as much space above the ground as a landowner can put to reasonable use. It was reasonable use as a residence that was "taken" from landowner Griggs. We have already suggested, that it may well be that the Gary Ordinance purported to deprive the Toll Road Commission of the reasonable use of its property for constructing an expressway. We take no position in that dispute. Actually the ordinance did not prevent construction of the freeway as the frequent low flying airplanes prevented landowners Causby and Griggs from using their properties. But suppose it had done so and is regarded by this Court as a "taking." It would not follow necessarily that all property within the several established zones was "taken", or even reduced in value.

This Court has recently made it very clear that an otherwise valid ordinance is not rendered unconstitutional merely because it deprives the property of its most beneficial use. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). There it was said of an ordinance prohibiting excavations below 2 feet above maximum ground water level:

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of

its most beneficial use does not render it unconstitutional. Walls v. Midland Carbon Co., 254 US 300, 65 L ed 276, 41 S Ct 118 (1920); Hadacheck v. Sebastian, 239 US 394, 60 L ed 348, 36 S Ct 143, Ann Cas 1917B 927 (1915); Reinman v. Little Rock, 237 US 171, 59 L ed 900, 35 S Ct 511 (1915); Mugler v. Kansas, 123 US 623, 31 L ed 205, 8 S Ct 273 (1887); see Laurel Hill Cemetery v. San Francisco, 216 US 358, 54 L ed 515, 30 S Ct 301 (1910)." 369 U.S. at 592, 93.

In a decision of earlier vintage this Court upheld action by the Secretary of War which prevented a riparian owner from using his property in the manner he regarded most beneficial, *i.e.*, for construction of a wharf. The Secretary had determined that it was "essential to the preservation and protection" of the harbor involved that a new harbor line be established. To do so required demolition of a portion of an existing wharf for which no compensation was paid. This Court held that the Secretary's action had not reached the point that it could be regarded as "arbitrary or wanton." *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 68 (1915). See also *U. S.* v. *Perma Paving Co.*, 332 F. 2d 754 (2d Cir., 1964).

So we are back to *Euclid* where we were told that various provisions of the ordinance must be "concretely applied to particular premises", found "clearly arbitrary and unreasonable" and unrelated to "public health, safety, morals and general welfare" before the ordinance can be declared unconstitutional and void.[19]

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[19] Our jurisprudence, of course, is one of judicial restraint when it comes to overturning legislative acts on the basis of the Constitution. A good modern day example of the reluctance of a Federal Court to upset the exercise of police power is *All American*

There is no single lesson to be learned from an exhaustive analysis of state decisions on zoning. It is noteworthy, however, that some courts of last resort in other states have reached opposite conclusions when height zoning, which is essentially what is involved here, was in issue. Illustrative are decisions in Wisconsin and Florida, the former an earlier decision upholding height limitations imposed on buildings for fire prevention purposes, the latter a recent one upholding height limitations in specified zones around an airport to protect air navigation.

In *Atkinson* v. *Piper, et al.*, 181 Wisc. 519, 195 N.W. 544 (1923), a statute passed by the Wisconsin Legislature limiting the height of buildings in cities of one class to 125 feet and those of another class to 100 feet was held to be a valid exercise of the state's police power. Quoting from this Court's opinion in *Hadacheck* v. *Sebastian, supra,* the Wisconsin Court stressed how imperative it is that police power, unless it is

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*Airways* v. *Village of Cedarhurst,* 201 F. 2d 273 (2d Cir., 1953) where the Second Circuit called for a trial and a complete record before it would consider invalidating an ordinance prohibiting flights over the village below specified altitudes, albeit in compliance with regulations of the Administrator. That Court said:

> " . . . On the other hand, we do not think we should take the position urged by the plaintiffs, and substantially followed by the district court, of declaring the ordinance clearly invalid at this preliminary stage of the proceedings. Before a trial we are not in a position to find that those defendants who are land owners cannot establish their claims of trespass and nuisance . . ." 201 F. 2d at 276.

True the matter before the Supreme Court of Indiana was not in the "preliminary stage of the proceedings." On the other hand, it does not appear that other remedies available to Respondent, remedies that would have permitted the ordinance to stand, were adequately explored. For instance, note the rejection of inverse condemnation. R. 216, 17.

arbitrarily exercised, be upheld even though it may seem harsh on some individuals.

In *Harrell's Candy Kitchen* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (1959), a landowner wanted to add height to a building in the vicinity of the municipal airport. The new height would exceed the 27.64 feet above level ground permitted by a Florida statute at that location. Harrell's property was situated to one side of the extended center line of a principal runway in an approach area. Like most real estate subject to the Gary Ordinance,[20] and other ordinances based on the FAA model, it did not lie directly in the path of the runway. In other words, normally there would be no flights passing over this parcel of real estate. The Supreme Court of Florida never seemed to doubt that this act of the legislature was a valid exercise of police power. That court said:

> "There is no longer any question concerning the power of the Legislature to authorize agencies of the government to adopt and enforce zoning regulations. We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and

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[20] The ordinance establishes four zones. Only in two of them, the Outer Area Approach Zone and the Inner Area Approach Zone are there likely to be regular over-flights. And only in the Inner Area Approach Zone, controlled by the 40 to 1 slope, are there likely to be over-flights very close to the ground. See Ordinance (R. 153, 54) and Gary Airport Zoning Map of April 12, 1949 (R. 158).

landing as well as those living in the vicinity thereof. In many cases this Court has upheld the exercise of the police power by counties and municipalities in the enactment of zoning regulations restricting height, number of stories, size of buildings and other structures, percentage of lots that may be occupied, the size of courts and other spaces, the density of population and the location of buildings and structures and land and water for trade, industry and other purposes. *There has been much litigation in the field of zoning, particularly in Florida, and the jurisprudence in that field has been extensively developed. These well settled principles now so firmly established with reference to municipal and county zoning apply equally to airport zoning.*" 111 So. 2d 443. (Emphasis supplied.) Cf. Rhyne, *Municipal Law*, sec. 22-22 (1957); McQuillin, *Municipal Corporations*, sec. 25.25.

**B. Zoning in the Vicinity of Airports Is Essential if the Nation's Policy of Encouraging the Development of Airports Safe Both for Aeronautical Users and for Airport Neighbors is to Continue.**

A necessary concomitant to a system of airports adequate to meet the nation's air transportation needs is freedom for local authorities, in partnership with the Federal Government, to adopt reasonable zoning regulations designed equally to protect persons and property moving by air and persons living, working and congregating in "airport districts." Such ordinances should not be overturned except in the most extreme cases. They should not be held invalid simply because they work a hardship on some individuals. In all cases public gain must be weighed against individual loss.

If the Gary Ordinance is consigned to oblivion and the airport forced to close, or hobble along with one

runway's utility greatly reduced, there will be little or no immediate impact upon the air transportation provided by air carrier members of this *amicus curiae*. But the "general aviation" operations handled by that airport will have to be absorbed elsewhere. See H.R. Rep. No. 1002, 88th Cong., 1 Sess. 16, 17 (1963). If all zoning ordinances in Indiana based on the FAA model are likewise destined for oblivion the impact upon air transportation becomes clearer. If Indiana's fate is multiplied by fifty the prospects of protecting approaches to the nation's airports are dim.[21] The alternative, indifference to safety and general welfare, is even more distressing.

As far back as 1943, the House Committee on Interstate and Foreign Commerce noted that "hundreds of millions of dollars are being spent on airports." H.R. Rep. No. 784, 78th Cong., 1st Sess. 11 (1943). The Federal Airport Act became effective in 1947 and since then a total of $741,723,839 has been made available by the Federal Government to states and local communities in net project funds. Grant agreements, like the one Gary undertook with FAA, have committed $695,171,206 of that sum and $550,609,855 actually have been spent. S. Rep. No. 446, 88th Cong., 1st Sess. 7 (1963). Early this year Congress appro-

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[21] Under the rationale of the decision below a two thousand foot "Eiffel Tower", three miles from Kennedy International Airport could immobilize a principal runway at that vital gateway through which some 12,754,000 passengers moved last year. Port of New York Authority, Annual Report of Airport Activity for Calendar Year 1963, pp. 13 and 35. An obstruction comparably situated could have an equally deleterious effect at Chicago's O'Hare Field where air carrier operations alone number nearly 1000 each day. FAA, Air Traffic Activity 39 (Calendar Year 1963).

priated an additional 150 million[22] bringing the total Federal involvement under the Airport Act alone just under the billion dollar mark. To receive Federal aid under the Act, states and local communities must put up matching funds equal to a minimum of 50% of the grant. Over-all Federal and state commitment to civilian airport development is already well over a billion dollars. A need for another billion (specifically $1,082,439,000) over the next five years is reflected in FAA's National Airport Plan recently submitted to Congress.[23]

The Federal concern with airport development, and its deep involvement in it, rests primarily upon the recognition of Congress, in common with this Court, that "the airplane is a part of the modern environment of life" (328 U.S. 266) and that airports are beneficial, not to special groups alone, but to the whole nation. In its Report to accompany S. 1153, amending the Federal Airport Act, the Senate Commerce Committee made this finding:

> "Airports are not just local assets. They do not just benefit the large airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens. Airports play an indispensable role in national defense, e.g., in World War II over 429 civil airports were made available to the Military Establishment. They are continually available to the military in times of national emergency. The use of civil airports,

[22] Authorized by Pub. L. 88-280, footnote 3, p. 3, *supra;* appropriated by Pub. L. 88-507, 88th Cong., 2d Sess. (August 30, 1964), p. 6.

[23] National Airport Plan, Requirements for Fiscal Years 1963-67, 1963 Supplement, FAA Ex. No. 1, p. 75 (March 1963).

however, is not limited to times of war and national emergency." S. Rep. No. 446, *supra*, at 17.

Congress is crucially concerned that everything be done, that can reasonably be done, to permit the airplane to take-off, fly and land safely. Relying on the Administrator's expert judgment and advice that aircraft are in critical configuration during take-offs and landings, Congress very recently ratified the Administrator's historical attempts to enlist local communities in the Federal effort to keep approach areas free of "hazards." Just last year it wrote into law the requirement, cited at page 3, *supra*, that the Administrator, as a condition to grant agreements, satisfy himself that a reasonable attempt will be made to zone around all airports listed on the National Airport Plan. This should remove any lingering doubts that Congress believes that airport zoning is reasonably related to public safety and general welfare.

Specifically the amendment adds a new paragraph to section 11 of the Federal Airport Act so that the section entitled "Project Sponsorship" now reads:

> "As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—
>
> * * *
>
> "(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft . . ." Pub. L. 88-280, *supra*.

And to show conclusively Congress' full awareness of the problem:

> "As noted previously, other than extending the act an additional 3 years and incorporating some minor amendments of a strictly technical nature, the committee has approved only one new provision. This provision would amend section 11 of the Federal Airport Act so as to provide, as a condition precedent to any grant that the Administrator of the Federal Aviation Agency satisfy himself that reasonable effort, including enactment of zoning laws, has been made to restrict the use of land adjacent to airports so as to make it compatible with the operation of the airport.
>
> "A number of witnesses questioned the desirability of this provision and were apprehensive as to its implications and the scope of its application. The committee appreciates the concern of these witnesses but does not share their fears that any unreasonable burdens will be placed on the local communities or the airport operators.
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> * * *
>
> "The growing seriousness of the aircraft noise problem cannot be ignored or dismissed with the attitude that time will eventually effect a solution. Within reason, every present means to alleviate noise should be employed. The committee is convinced that the single most important means is to insure adequate zoning and that the proposed amendment will contribute to such an effort." S. Rep. No. 446, *supra*, at 20-22.[24]

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[24] The colloquy between Senator Monroney and Administrator Halaby regarding Dulles International Airport during the latter's testimony on S. 1153 is incisive. It shows, *inter alia*, that the mere purchase of huge tracts of land does not solve the problem—that reasonable zoning is essential too, if the public good is served. Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, 88th Cong., 1st Sess., ser. 10 at 20-25 (1963). See *State Flood-Plain Zoning*, DePaul L. Rev., Summer 1963, 246-262.

The Report of the House Committee on Interstate and Foreign Commerce is *in pari materia*. H.R. Rep. 1002, *supra*, at 6.

CAB's accident investigation statistics greatly illuminate the relationship of airport zoning to public safety and welfare. They go a long way toward explaining why national policy encourages airport zoning. An excess of two thirds of all aircraft accidents have happened either on or within 5 miles of airports. This is uniformly true year after year. For example, during the 5 year period 1957 through 1961, CAB informs that 66% of all air carrier accidents and fatalities occurred within this area. In the case of general aviation the figure was 72.6% for the three year period 1959 through 1961.[25]

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| Year | Total Number of Accidents | Number of Accidents on or Within 5 Miles of Airport | Percentage of Accidents on or Within 5 Miles of Airport |
|---|---|---|---|
| U.S. Air Carriers: | | | |
| 1957 | 112 | 71 | 63 |
| 1958 | 91 | 64 | 71 |
| 1959 | 101 | 61 | 60 |
| 1960 | 90 | 61 | 67 |
| 1961 | 84 | 61 | 72 |

Accidents, Fatalities Within the Vicinity of the Airport, Civil Aeronautics Board Bureau of Safety, Aug. 22, 1963.

| | | | |
|---|---|---|---|
| General Aviation (Small Fixed Wing): | | | |
| 1959 | 4149 | 2893 | 69 |
| 1960 | 4384 | 5307 | 75 |
| 1961 | 4168 | 3096 | 74 |

CAB, Bureau of Safety Statistical Review, General Aviation, Calendar Year 1959, pp. 13, 19, 27; Calendar Year 1960, pp. 13, 19, 27; Calendar Year 1961, pp. 13, 19, 27.

Honorable Alan S. Boyd, Chairman of the Civil Aeronautics Board, testified to the same effect last year in supporting amendments to the Federal Airport Act. Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, 88th Cong., 1st Sess., ser. 10 at 29 (1963).

President Truman revealed an awareness of this pattern in 1952 when he asked General J. H. Doolittle to serve as Chairman of the President's Airport Commission which included the Administrator of Civil Aeronautics, Mr. Charles F. Horne, and Dr. Jerome Hunsaker, Head, Department of Aeronautics, Massachusetts Institute of Technology. The Commission was asked to look into the problem of airport location and use. The President's letter to General Doolittle, appointing him Chairman, opened with these words:

> "For some time now, I have been seriously concerned about airplane accidents, both commercial and military, *that have occurred in the take-off and landing of aircraft,* especially in heavily populated areas. I have been concerned about the loss of life and I have been concerned about the anxiety in some of our cities. I have decided to set up a temporary President's Airport Commission to look into the problem of airport location and use . . ." Report of the President's Airport Commission, *The Airport and Its Neighbors,* p.v., May 16, 1962. (Emphasis supplied.)

The so-called Doolittle Report submitted to the President, no less than the statistics from CAB, attests the relationship between airport zoning regulations and public safety and general welfare. In a section entitled "An Analysis of Risk" the report said:

> "An airport exists within a community for the use of aircraft supplying the city with services necessary to its welfare. When paths of flight to and from the airport pass over inhabited areas, operations can constitute a potential hazard to people who live or work in the airport approach zones. Similarly, any type of construction in the approach zone represents a potential risk to the aircraft and its occupants on take-off and landing,

*while tall structures under the airways create a hazard to navigation dangerous both to people in the airplane and on the ground.*

"*The possibility of* an aircraft *crashing* into one's home is *greatest* in the narrow, elongated strip of land that underlies *the approach zone* to runways on airports. Commercial (air carrier) and military airplanes that have caused death or injury to persons on the ground near airports have, in most cases, struck close to the projection of the centerline of the runway and within the approach zone (fig. 7)." *Id.* at pp. 49, 51. (Emphasis supplied.)

It would contradict all of this experience to hold that zoning regulations imposing height limitations in airport approaches are not substantially related to public safety and general welfare. Without offending common sense, it cannot be said that any regulation is more immediately connected with safety than one designed to prevent aircraft, approaching for a landing, from colliding with an obstruction and spreading wreckage over adjacent property. In recognition of governmental responsibility for the safety of people living near airports, no less than for those who fly,[26] the Administrator and Congress have encouraged local communities to undertake appropriate zoning around airports. In recognition of their obligations to consider public safety and the general welfare, a number of communities, including Gary, Indiana, have responded to the Federal urging.

In Gary's case, the Supreme Court of Indiana, though failing to say that the ordinance in question

[26] Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, footnote 24, *supra*, at 22 and 23.

is not substantially related to public safety and welfare, has viewed it, not as a conscientious attempt to make the environs of an airport a safe place to live and work, but as an effort to circumvent the Constitution and take private property under the guise of the police power. If a decision so postulating is allowed to supersede the test this Court established in *Euclid* and become the norm by which zoning around the nation's airports is to be judged, then surely Mr. Justice Cardozo was right when, discussing airports, he wrote for the Court of Appeals of New York: "The dwellers within the gates, even more than the stranger from afar, will pay the price of blindness." *Hesse* v. *Roth*, 249 N.Y. 436, 164 N.E. 342 (1928).

A strange logic would protect a river's channel but permit its harbors to fill in. A stranger Constitution is needed to allow a riparian's wharf to be razed without recompense but permit a hazard to go up in navigable airspace beyond the reach of police power.[27]

## III. CONCLUSION

The Supreme Court of Indiana erred in treating the Gary Ordinance as a "taking" of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and a "taking" for public use without compensation in violation of Article 1, sec. 21 of the State Constitution, rather than as a zoning regulation, the objectives of which are substantially related to public safety and the general welfare, and thus a valid exercise of the states' police power. Assuming, *arguendo*, that as applied to Respondent's property, particular sections

[27] Cf. *Greenleaf-Johnson Lumber Co.* v. *Garrison*, *supra*, and *U.S.* v. *Perma Paving Co.*, *supra*, with the decision below.

of the ordinance are arbitrary and unreasonable, the court erred in not confining its decision to such a specific application rather than declaring the ordinance void in its entirety.

Wherefore, this *amicus curiae* urges this Court to reverse, limit or clarify the decision of the Indiana Supreme Court to make clear that it does not regard zoning around airports as different from other types of zoning and that airport zoning, including that based on the FAA model, should be judged constitutionally as specified in this Court's opinion in *Euclid* v. *Ambler, supra,* and not treated a priori a "taking or appropriating of private property for a specific public use."

## IV. SUMMARY OF ARGUMENT

Police power, which resides in the several states, has been used for many purposes ranging all the way from limiting freedom of speech to restricting the height of buildings for aesthetic purposes. *Supra,* pp. 5-7. Statutes and regulations adopted pursuant to police power have been held valid when they were shown to be substantially related to "public health, safety, morals or general welfare." *Supra,* pp. 6-10.

Noting that zoning laws are of relatively modern origin, this Court, in *Euclid* v. *Ambler, supra,* upheld the constitutionality of a comprehensive zoning regulation, among other things, limiting the height of buildings in specified areas. That decision charted the course to be followed in judging zoning regulations. There it was said that before such regulations can be declared unconstitutional, they must be "concretely applied to particular premises" and the provisions so applied must be found "clearly arbitrary and unreasonable, having no substantial relation to

the public health, safety, morals, or general welfare". *Supra,* pp. 8-10.

The Supreme Court of Indiana, in deciding the instant case, made no effort to follow the instructions of *Euclid.* Instead of treating the several provisions of the Gary Ordinance separately and applying each concretely to Respondent's premises, that court declared the whole ordinance unconstitutional as a "taking" of private property without compensation under the guise of police power and thus violative of the Fourteenth Amendment to the United States Constitution and Article 1, sec. 21 of the State Constitution. Nowhere did the court indicate wherein the ordinance, which was based on a model devised by FAA, the Federal Agency responsible for promoting aviation safety, was not substantially related to public safety and general welfare. *Supra,* pp. 10 and 11. Cf. *Harrell's Candy Kitchen* v. *Sarasota-Manatee Airport Authority, supra.*

We take no position as to whether specific provisions of the Gary Ordinance may be considered a "taking" or otherwise void when applied to Respondent's identifiable real estate. We submit that the court below erred in striking down the ordinance *in toto.*

In addition to its erroneous treatment of zoning in the vicinity of airports as different from other zoning, the decision below is based upon a misconception of decisions of this Court in which a "taking" was said to have occurred — particularly *United States* v. *Causby, supra,* and *Griggs* v. *Allegheny County, supra,* where frequent over-flights at very low altitudes were held to "take" the reasonable use of property as a residence. (Note *Goldblatt* v. *Town of Hempstead, supra,* where it was held that an ordinance is

not unconstitutional merely because it deprives property of its most beneficial use.) Moreover, if it is not the product of confusion, the decision below applies a double standard for measuring "taking"—the ordinance was declared a "taking" per se, yet "actual encroachment" by aircraft was said to be needed to support an inverse condemnation proceeding. *Supra,* pp. 11-13.

If the nation's air transport needs are to be served through safe and efficient airports, a Federal-State partnership is essential. The Federal Government must provide financial assistance to local communities and devise safe operating procedures. States (and local communities) must use police power to adopt appropriate zoning regulations to protect approaches to the airport for the safety and well-being of both the traveling public and airport neighbors. *Supra,* pp. 3-8, 19, 21-24.

The Federal involvement in airport development and the promotion of safety is immense, both in terms of dollars and regulation. Earlier this year, Congress amended the Federal Airport Act to require the Administrator, as a condition precedent to Federal assistance under the Airport Act, to receive written assurances from airport sponsors that appropriate zoning will be undertaken to restrict the use of land in the immediate vicinity of airports to activities and purposes compatible with normal operations, which include landings and take-offs. The legislative history of this amendment makes it clear that Congress regards airport zoning as substantially related to public safety and general welfare. *Supra,* pp. 19-24.

"Substantial relation" of airport zoning to public safety and general welfare is further attested by

accident investigation statistics provided by CAB which reveal that year after year more than two-thirds of all aircraft accidents occur on or within 5 miles of airports—by the notoriety that led President Truman to create the Doolittle Commission to look into the matter—and by the so-called Doolittle Report which emphasizes that the possibility of crashing is greatest in the approach zone and that tall structures create "a hazard to navigation dangerous both to people in the airplane and on the ground". *Supra*, pp. 24-26.

The Indiana Court's a priori nullification of a zoning ordinance based on the FAA model thus: goes off the course charted in *Euclid;* tends to obscure the meaning of *Causby* and *Griggs;* and paralyzes efforts in Indiana to cooperate with the Federal Government in making airports safer for the traveling public and airport communities safer places in which to live and work. If the decision is upheld and followed in other states, approaches to the nation's airports, unlike the nation's harbors, will be placed beyond the reach of governmental regulation. See *Greenleaf-Johnson Lumber Co., supra.*

Respectfully submitted,

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